In early February, after complaining of having been cheated because the heroin had not been pure, Agent Zirilli asked to meet Russo's supplier. Russo said, "Come on, I'll call my man," and placed a call to petitioner's telephone number in Bloomfield, New Jersey (G.A. 11–13, Tr. 417). Russo reported that "his man" had claimed that the heroin had been pure, but that Zirilli could return it for a refund of his money. Agent Zirilli answered that he had already sold the heroin (G.A. 13).

A few days later, on February 12, DiGregorio told Agent Zirilli that he had spoken to "Sam", who had insisted that the heroin had been pure and wanted to continue doing business with Zirilli. Again Agent Zirilli asked to meet "Sam". DiGregorio and Russo placed a telephone call and fixed a time and place the next day for Zirilli to meet "Sam", but "Sam" never appeared (G.A. 14–18).

There was further discussion about meeting "Sam", and then on February 16, Agent Zirilli, DiGregorio, Russo, and the special employee drove to Bloomfield, New Jersey, and met petitioner in the office of an Esso Service Station (G.A. 18–21). In answer to Agent Zirilli's complaints about the January 31 purchase, petitioner said (G.A. 21):

> Why the first buy was pure. * * * I tested it myself. It broke 230. It was 95 percent pure.

Thereafter, Zirilli demanded to know who would be responsible the next time. Petitioner replied, "Don't worry about it. Everything will go all right, everything will go out all right." Petitioner told Zirilli

to continue doing business with Russo and DiGregorio and, if he were dissatisfied with the heroin, to return it to Russo and receive his money back. Narcotics agents had petitioner under surveillance and saw him enter the office and speak with Zirilli and the others (G.A. 19–23).

2. *Sale of February 18, 1955.*—Two days later at about 3 p.m., Agent Zirilli met DiGregorio at a restaurant and paid $9,600 for a kilo of heroin. About 4:45 p.m., Russo telephoned Zirilli at the restaurant that he and "Sam" were caught in heavy traffic and that DiGregorio would be late. About 5 p.m., DiGregorio delivered to Agent Zirilli a brown-paper package containing the promised kilo of heroin (G.A. 24–28). While Zirilli was in the restaurant, other narcotics agents were following petitioner, who left his home in New Jersey about 2 p.m., drove to New York City, and placed a telephone call from a drug store. A few minutes later, the agents lost petitioner in the city traffic, but they saw him again about 4 p.m., this time driving with Russo in the car. Petitioner stopped his car, picked up DiGregorio, drove 150 feet, stopped again to let DiGregorio out, and then drove away. On leaving petitioner's car, DiGregorio made a "hitching" motion, as if he were carrying a package underneath his arm inside his overcoat. DiGregorio then drove directly to the restaurant where Zirilli was waiting. When he stepped out of the car, he was carrying a brown-paper package (Tr. 208–213, 242–249).

3. *Trip to Italy.*—On April 28, Agent Zirilli, DiGregorio, and the special employee met petitioner at

the same Esso Station to discuss plans for Zirilli to travel to Italy to bring back a $40,000 shipment of heroin. After agreeing with Zirilli on the details, petitioner said that he would write to Italy to make the final arrangements (G.A. 34–37). Narcotics agents surveilling petitioner saw him engage in this conversation with Agent Zirilli, DiGregorio, and the special employee (Tr. 309–311). About a week later, DiGregorio informed Zirilli that the trip had not been approved by the people in Italy (G.A. 38–39).

4. *Petitioner's trial testimony.*—The government's case against petitioner consisted principally of the testimony of Agent Zirilli and of other narcotics agents who had kept petitioner, Russo, and DiGregorio under surveillance. Zirilli's testimony about his two meetings with petitioner on February 16 and April 28 was corroborated by narcotics agents who actually observed petitioner talking to Zirilli, DiGregorio, Russo,[4] and the special employee on those dates (Tr. 303–307, 309–311). Testifying in his own defense, petitioner denied on direct examination that he had seen Russo on February 16 or DiGregorio on that date and April 28. He further testified that he had never seen Agent Zirilli before the trial (Tr. 447, 451–452, 455–456). During his cross-examination, petitioner said that he did not know a person named Cristoforo Rubino, that never before had he seen Daniel Belmont (a narcotics agent who had testified earlier for the government), and that he had never told Agent Belmont that he had met with Russo, DiGregorio, and Agent Zirilli (G.A. 44; Tr. 577–581).

[4] Russo was not present at the meeting of April 28.

The government then recalled Agent Belmont, who testified that on September 22, 1955—about a month after petitioner had retained counsel and pleaded not guilty to the indictment (P.A. 1–2)—he went to the Esso Station in Bloomfield, New Jersey, to serve a subpoena on petitioner's son-in-law. Petitioner was there and asked Agent Belmont, "What are you doing here" (G.A. 40–42). The following occurred (G.A. 42–43):

> Q. What did he say Agent Belmont? A. "Help me. Help me."
>
> And I said, "How can I help you?"
>
> He said, "I need a lawyer."
>
> I said, "Well, you have a lawyer." Mr. Callander was, to my knowledge, his lawyer.
>
> And he went on to tell me that he didn't do this and that the case was all made up against him; that he never sold narcotics.
>
> And I told him that I was aware of all of the details of the case; all of the conversations that he had in this gas station with Frank DiGregorio and Joe Russo were documented and complete memoranda were made up; copies went to Washington; that all of this case was documented; that there would be a trial and at the trial if he felt he was innocent he would be heard before a jury and he would have a fair trial.
>
> He protested that he did see these two men on two occasions at the gas station, Frank DiGregorio and Joe Russo, and this agent De Matteo, who called himself Truglio,[3] he knew then that he didn't talk narcotics; when they talked narcotics he chased them—his words, he

[3] "Truglio" was Agent Zirilli's undercover name (G.A. 44).

> chased them away; that this agent, De Matteo, who calls himself Truglio, talked with him about $45,000 and a trip to Italy to get stuff.
>
> The conversation went on. He said he did chase them away when he found out that it was for narcotics. He would have nothing to do with it.

Agent Belmont further testified that the following occurred (G.A. 44):

> Q. Was there any further conversation? A. We talked about other people that were—I don't know how to put this now; whether he knew certain people that were in the same investigation—let's put it that way—and I mentioned to him several names of different people, one of whom was Christoforo Rubino. He said he knew him from Brooklyn but denied that he had talked to him on the phone or had any transactions with him.

Except for preliminary objections that Belmont's testimony was improper rebuttal (G.A. 40–41), it was received without objection.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 11–13) that the rule of *Massiah* v. *United States*, 377 U.S. 201, barred Agent Belmont from testifying about a post-indictment conversation in which petitioner had made statements inconsistent with his testimony at the trial. The *Massiah* rule does not apply to every post-indictment utterance by an accused, but only to statements "deliberately elicited" by the government. 377 U.S. at 206. Belmont's purpose in going to the Esso Station was to serve a subpoena on petitioner's

son-in-law; coincidentally, petitioner happened to be there when the agent arrived (Tr. 443–445, 454–455). Petitioner then initiated the conversation, and asserted his innocence. Belmont did not deliberately elicit incriminating statements; at most, he was a passive listener. Moreover, there was no deception in the present case. Petitioner knew and recognized Belmont as a government agent and voluntarily spoke to him in the absence of his attorney. Finally, as the court of appeals held (Pet. App. 9–10), even if Agent Belmont had acted illegally, the government could use the evidence to impeach petitioner's testimony on direct examination that he had never met with Zirilli and the others. *United States* v. *Guerra*, 334 F. 2d 138, 143 (C.A. 2), certiorari denied, 379 U.S. 936; see *Walder* v. *United States*, 347 U.S. 62.

Nor was petitioner prejudiced by the testimony that he had admitted knowing Christoforo Rubino. Rubino was never mentioned at any other time during the trial, so that the evidence of petitioner's admission that he knew him was inconsequential and did not constitute reversible error, particularly in the absence of objection.[6] *United States* v. *Guerra*, 334 F. 2d 138, 144 (C.A. 2), certiorari denied, 379 U.S. 936.

2. Contrary to petitioner's contentions (Pet. 14, 15–17), the trial court properly received evidence concerning petitioner's acts in furtherance of the conspiracy between the last sale to Agent Zirilli on

[6] The trial in the instant case, at which petitioner did not object to proof of his post-indictment statements, occurred in July 1965—after this Court's decisions in *Massiah* v. *United States*, *supra*, and *Escobedo* v. *Illinois*, 378 U.S. 478.

February 18, 1955, and petitioner's arrest on August 3, 1955. Count five of the indictment charged petitioner and his codefendants, Russo and DiGregorio, with conspiring to transport and sell narcotics between January 1, 1955, and August 15, 1955. The testimony about petitioner's acts after the last sale of heroin to Agent Zirilli was plainly in furtherance of that conspiracy, for the testimony dealt with petitioner's efforts in April to send Zirilli to Europe to obtain more heroin for distribution in this country. All acts and declarations in furtherance of the conspiracy were admissible at the trial. *E.g., Lutwak* v. *United States,* 344 U.S. 604, 615. The conspiracy continued through August 3 (when petitioner was arrested), and petitioner admits that his theory that it ended on February 18 is not supported by any authority (Pet. 15).[7]

3. Petitioner's objections to the jury instruction are groundless (Pet. 18–23, 24–31). The instructions on reasonable doubt (P.A. 27–28) were suggested by this Court in *Holland* v. *United States,* 348 U.S. 121, 140. Petitioner made no objection to the government's request for instructions (G.A. 46–47) setting forth the well settled principle that statements made by a partner in a joint venture, and in furtherance of it, are admissible against all partners to the venture. *E.g., United States* v. *Annunziato,* 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919; *United*

[7] In addition, we disagree with petitioner's assumption (Pet. 15) that the "investigative net" closed on February 18 when Zirilli made his last purchase of narcotics. The government was still investigating in April when Agent Zirilli negotiated with petitioner about the trip to Europe.

States v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); cf. *St. Clair* v. *United States*, 154 U.S. 134, 139.[8]

4. It is well settled that the sentencing court could impose consecutive sentences for the conspiracy count and for each of the separate substantive narcotics counts charged in the indictment. *Callanan* v. *United States*, 364 U.S. 587; *Gore* v. *United States*, 357 U.S. 386; *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640; *Blockburger* v. *United States*, 284 U.S. 299.

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[8] We call to the Court's attention that although the trial court granted the government's request, petitioner is mistaken in his assumption that the trial court actually gave the instruction. The court instructed the jury that if petitioner's own statements and conduct showed that he participated in the conspiracy, the declarations and acts of his co-conspirators were binding on him as to the conspiracy count, but the court was silent about whether the co-conspirators' declarations and acts bound him on the substantive counts (P.A. 51). Petitioner does not contend that these instructions prejudiced him, and since he did not object to the instructions (G.A. 46–47; P.A. 71–72), F.R. Crim. P., Rule 30, precludes him from making any such contention on appeal. In any event, even if the jury did interpret the instructions to mean that the declarations and acts of the co-conspirators also bound petitioner on the substantive counts, no harm resulted. Since the government proved petitioner guilty on the conspiracy counts, and since the substantive counts were in furtherance of the conspiracy, petitioner was in fact bound by the statements of his co-conspirators on the substantive counts as well. *Pinkerton* v. *United States*, 328 U.S. 640, 645; *United States* v. *Annunziato*, 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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